



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2004

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2004-1005

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 195972.

The Texas Department of Criminal Justice (the "department") received a request for the "intellectual functioning test results" contained in the "social and criminal history form" of a named inmate's former and current incarceration files and the named inmate's medical records.¹ The department received a second request from the same requestor for "any and all prison records" pertaining to the same named individual. You claim that the "intellectual functioning test results" for the named inmate contained in his prior non-capital incarceration files are excepted from disclosure under section 552.134. You contend that the request for "any and all prison records" pertaining to the current incarceration records should not be considered a request for information under the Act pursuant to section 552.0055 of the Government Code. In the alternative, you claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We note that you have not raised any exceptions to disclosure pertaining to the former incarceration records of the

¹ The department has directed the requestor to the UTMB Medical Department at the Polunsky Unit to determine the procedure for obtaining the medical records. We note that the Public Information Act (the "Act"), chapter 552 of the Government Code, does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

named individual, which is encompassed in the requestor's request for "any and all prison records," nor have you submitted any information regarding the former records. Accordingly, we assume you have released such information, to the extent it existed on the date of the department's receipt of this request. If not, you must release it immediately. See Gov't Code §§ 552.006,.301,.302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

Initially, we address your assertion that the request for "any and all prison records" pertaining to the named inmate's current incarceration records should not be viewed as a request for information under the Act. Section 552.0055 of the Government Code provides that "[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter." Gov't Code § 552.0055. In this instance, we find, and you acknowledge, that the requestor is not listed as counsel for the inmate and is not otherwise a party to the pending habeas corpus proceeding. Thus, the requestor is unable to make a discovery request. See Code Crim. Proc. art 39.14. Upon review, we conclude that the request for "any and all prison records" constitutes a request for public information for the purposes of the Act.

Next, we note that portions of the submitted information found in the current incarceration records of the named inmate includes completed reports and investigations made of, for, or by the department. Section 552.022 of the Government Code provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" constitutes "public information. . . not excepted from required disclosure. . . unless. . . expressly confidential under other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. You assert instead that it may be withheld pursuant to section 552.103 of the Government Code. This section is a discretionary exception to disclosure that protects a governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); see also Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, the completed investigations and reports we have marked may not be withheld pursuant to section 552.103. Because you do not claim and our review does not indicate that these reports are confidential under other law, they must be released.

We now turn to your claimed exception under section 552.103 for the remaining information found in the current incarceration records of the named inmate. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). We also note that section 552.103(b) provides that “[f]or purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and post-conviction remedies in state and federal court.”

You state and provide documentation showing that the named inmate's application for writ of habeas corpus, cause number 45, 249-02, was granted by the Court of Criminal Appeals pursuant to Article 11 of the Code of Criminal Procedures and the case was remanded to trial court.² Thus, the inmate is currently involved in a pending habeas corpus proceeding regarding his conviction. Based on your representations and our review of the submitted information, we conclude that you have shown that litigation was pending on the date the department received the present request for information pertaining to the current incarceration files of the inmate and the department is a party to this pending litigation. Thus, most of the remaining information in the current incarceration records that is not subject to release under section 552.022 may be withheld from disclosure at this time pursuant to section 552.103.

² We note that the application for writ of habeas corpus was granted on September 10, 2003.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, responsive information to which the parties in the pending litigation have had access is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that the named inmate has signed and seen some of the visitation logs contained in the current incarceration records. Thus, section 552.103 does not apply to this information, which we have marked. However, these visitation logs are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of constitutional privacy. The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common-law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). In Open Records Decision No. 430 (1985), our office determined that the list of inmate visitors is protected by constitutional privacy because people who correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. *See also* Open Records Decision No. 185 (1978). In Open Records Decision No. 185, our office found that "the public's right to obtain an inmate's correspondence list is not sufficient to overcome the first amendment right of the inmate's correspondents to maintain communication with him free of the threat of public exposure." In this instance, we find that the submitted inmate visitors logs found in the current incarceration records are confidential under constitutional privacy. Although the requestor obtained a purported authorization from the named inmate to release the submitted information, we note that the requestor does not have a right of access to this information under section 552.023 of the Government Code because the constitutional rights

of the visitors listed in the visitor logs are implicated in this case.³ See Open Records Decision No. 185 (1978). Thus the inmate visitors logs we have marked must be withheld under section 552.101.

We now address your section 552.134 of the Government Code assertion in regards to the remaining requested information pertaining to the “intellectual functioning test results” found in the named inmate’s former incarceration files. Section 552.134 relates to inmates of the department. This exception provides in relevant part:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

(b) Subsection (a) does not apply to:

...

(2) information about an inmate sentenced to death.

You state that submitted information regarding the requested “intellectual functioning test results” concerns an inmate who is currently confined in a facility operated by the department and who has been sentenced to death. However, you explain that the remaining submitted information is about the inmate while he was incarcerated with the department for a previous non-capital offense. Consequently, the remaining submitted material is information about a department inmate, but it is not “information about an inmate sentenced to death.” Because the submitted information was not created at a time when the inmate was sentenced to death and is not maintained in the inmate’s current death row file, we find that section 552.134(a) of the Government Code is applicable to this information. Thus, the “intellectual functioning test results” contained in the inmate’s former non-capital offense files are excepted under section 552.134.

In summary, the completed investigations and reports we have marked in the current incarceration records must be released in accordance with section 552.022(a)(1). With the exception of the inmate visitors logs we have marked and any other documents to which the parties in the pending litigation have had access, the remaining submitted information in the current incarceration records may be withheld under section 552.103. The inmate visitors

³ Government Code section 552.023(a) states that a person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and is protected from public disclosure by laws intended to protect that person’s privacy interests.

logs we have marked are excepted from disclosure pursuant to section 552.101 and constitutional privacy. Finally, the “intellectual functioning test results” contained in the named inmate’s former non-capital offense files are excepted under section 552.134.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Debbie K. Lee".

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 195972

Enc. Submitted documents

c: Ms. Randi N. Chavez
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(w/o enclosures)